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07 UNITED STATES DISTRICT COURT
08 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

09 JEAN M. JAMES,) CASE NO. C04-2455-MJB
10 Plaintiff,)
11 v.) MEMORANDUM OPINION
12 JO ANNE B. BARNHART, Commissioner)
13 of Social Security,)
14 Defendant.)
_____)
_____)

15
16 Plaintiff Jean M. James proceeds through counsel in her appeal of a final
17 decision of the Commissioner of the Social Security Administration
18 (“Commissioner”). After a hearing before an Administrative Law Judge (“ALJ”), the
19 Commissioner denied Plaintiff’s application for Disability Insurance Benefits (“DIB”)
20 pursuant to 42 U.S.C. §423 of the Social Security Act (“the Act”). Having considered
21 the ALJ’s decision, the administrative record (Tr.), and all memoranda of record, the
22 Court hereby REVERSES and REMANDS for further proceedings.¹

23 I. FACTS AND PROCEDURAL HISTORY

24 Plaintiff initially applied for both retirement benefits and for DIB in July 2000.
25 Although she became entitled to retirement benefits, her application for DIB was

26 ¹Pursuant to the consent of the parties, this case has been referred to the undersigned in
accordance with 28 U.S.C. § 636(c), Fed. R. Civ. P. 73, and Local Rule MJR 13.

01 denied, and she did not appeal. Plaintiff again applied for DIB on March 20, 2001,
02 alleging the same disability onset date of April 1, 1999, due to back pain that restricted
03 her ability to lift, push and pull. In her second application, Plaintiff also alleged
04 limitations based on incontinence and eczema. Plaintiff's second application was
05 denied on August 17, 2001, and upon reconsideration on June 6, 2002. Plaintiff filed
06 a request for a hearing, and a hearing was held before ALJ Arthur Joyner on
07 December 18, 2003. ALJ Joyner took testimony from: (1) the Plaintiff (Tr. 275-318.);
08 (2) medical expert, Kenneth D. Sawyer, M.D., a non-examining, non-treating
09 physician (Tr. 318-320.); and (3) vocational expert Stephen R. Van Hooten. Tr. 320-
10 324. The ALJ issued a decision denying Plaintiff benefits on May 15, 2004. Tr. 19-
11 28. Plaintiff appealed the ALJ's decision to the Appeals Council, which declined to
12 review Plaintiff's claim. Tr. 7-10. Plaintiff appealed this final decision of the
13 Commissioner to this Court.

14 II. THE PARTIES' POSITIONS

15 Plaintiff requests that the Court reverse the Commissioner's decision and award
16 disability benefits, or, in the alternative, remand the case for further proceedings.
17 Plaintiff argues that the ALJ made errors at steps two, four and five of the sequential
18 evaluation process. The Commissioner asserts that Plaintiff has failed to overcome the
19 presumption of continuing non-disability, and that the ALJ's decision is supported by
20 substantial evidence and should be affirmed.

21 III. JURISDICTION

22 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C.
23 § 405(g).

24 IV. STANDARD OF REVIEW

25 This Court's review of the ALJ's decision is limited to whether the decision is
26 in accordance with the law and the findings supported by substantial evidence in the

01 record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial
02 evidence means more than a scintilla, but less than a preponderance; it means such
03 relevant evidence as a reasonable mind might accept as adequate to support a
04 conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more
05 than one rational interpretation, one of which supports the ALJ's decision, the Court
06 must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

07 08 V. EVALUATING DISABILITY

09 A claimant bears the burden of proving that he or she is disabled. *Meanel v.*
10 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Disability is defined as the inability to
11 engage in any substantial gainful activity by reason of any medically determinable
12 physical or mental impairment, which can be expected to result in death, or which has
13 lasted or can be expected to last for a continuous period of not less than twelve
14 months. 42 U.S.C. § 423 (d)(1)(A).

15 The Commissioner follows a five-step sequential evaluation process for
16 determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920
17 (2000). At step one, the claimant must establish that he or she is not engaging in any
18 substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, the
19 claimant must establish that he or she has one or more medically determinable severe
20 impairments or combination of impairments. If the claimant does not have a "severe"
21 impairment, he or she is not disabled. *Id.* at § (c). At step three, the Commissioner
22 will determine whether the claimant's impairment meets or equals any of the listed
23 impairments described in the regulations. A claimant who meets one of the listings is
24 disabled. *See Id.* at § (d).

25 At step four, if the claimant's impairment neither meets nor equals one of the
26 impairments listed in the regulations, the Commissioner evaluates the claimant's

01 residual functional capacity and the physical and mental demands of the claimant's
02 past relevant work. *Id.* at § (e). If the claimant is not able to perform his or her past
03 relevant work, the burden shifts to the Commissioner at step five to show that the
04 claimant can perform some other work that exists in significant numbers in the
05 national economy, taking into consideration the claimant's residual functional
06 capacity, age, education, and work experience. *Id.* at § (f); *Tackett v. Apfel*, 180 F.3d
07 1094, 1100 (9th Cir. 1999). If the Commissioner finds the claimant unable to perform
08 other work, then the claimant is found disabled.

09 VI. SUMMARY OF THE RECORD EVIDENCE

10 Plaintiff was born on XXXX, 1938.² Tr. 38. She completed one year of
11 business college in 1969 and has had some computer training. Tr. 88, 97. Plaintiff
12 previously worked as a waitress, temporary packing worker, document control
13 specialist, and front desk clerk. Tr. 84. Plaintiff was age 62 at the time of this
14 disability application, and was almost 66 at the time of the ALJ's decision.³ Plaintiff
15 asserts that limitations relating to back and knee pain, as well as incontinence and
16 eczema, render her disabled. Tr. 22. Other evidence relevant to Plaintiff's allegations
17 is incorporated into the discussion below.

18 VII. THE ALJ'S DECISION

19 At step one, the ALJ found that Plaintiff had not engaged in substantial gainful
20 activity since her alleged onset date of April 1, 1999. Tr. 23. At step two, he found
21 Plaintiff's back and knee impairments to be severe. Tr. 24. At step three, the ALJ

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23 ² Plaintiff's date of birth is redacted back to the year of birth in accordance with the
24 General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the
official policy on privacy adopted by the Judicial Conference of the United States.

25 ³ Persons born in 1938 attain full retirement age at 65 years and 2 months. 20 C.F.R. §
26 404.409. Plaintiff's entitlement to retirement benefits is not at issue in this case. However, she
seeks disability payments for the period of time between her alleged onset date of April 1, 1999,
and the time she became eligible for retirement benefits.

01 found that Plaintiff's impairments did not meet or equal the criteria for any listed
02 impairments. Tr. 25.

03 The ALJ determined at step four that Plaintiff retained the RFC to perform a
04 limited range of light exertion: she could lift and/or carry a maximum of twenty
05 pounds occasionally and ten pounds frequently; she could stand and/or walk (with
06 normal breaks) for two hours at one time and not more than six hours out of an eight-
07 hour workday; she could sit (with normal breaks) for two hours at one time and not
08 more than six hours out of an eight-hour workday; she could occasionally climb stairs
09 and balance, but she should avoid repetitive pushing or pulling with her lower
10 extremities and bending or stooping; she could occasionally reach overhead, could do
11 handling (gross manipulation) and fingering (fine manipulation); she had no visual,
12 hearing, or speaking limitations and she had no environmental limitations except that
13 she should avoid heights and hazards. Tr. 26.

14 The ALJ found that Plaintiff's past work as a document control specialist was
15 similar to that of a mortgage clerk, did not require the performance of activities
16 precluded by her RFC, and that her impairments therefore did not prevent her from
17 performing past relevant work. Tr. 27. The ALJ found that Plaintiff was not under a
18 disability, as defined in the Social Security Act, at any time from the alleged onset
19 date through the date of the decision. *Id.*⁴

20 VIII. DISCUSSION

21 A. Presumption of Continuing Non-Disability

22 Plaintiff first filed an application for disability benefits in July 2000. Tr. 22.
23 That application was denied, and Plaintiff did not appeal. The denial became binding
24 when a timely request for reconsideration was not made. 20 C.F.R. § 404.905.

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26 ⁴Because the ALJ found at step four that Plaintiff was not disabled, he did not address step five of the sequential evaluation process.

01 Plaintiff filed the instant claim in March 2001. Tr. 22. Under Ninth Circuit law, a
02 previous finding that a Plaintiff is not disabled creates a continuing presumption of
03 non-disability. *See Lester v. Chater*, 81 F.3d 821, 827 (9th Cir. 1996). The
04 presumption of continuing nondisability may be rebutted only if the Plaintiff can show
05 “changed circumstances.” *Id.* The Social Security Administration (SSA) issued a
06 ruling (Acquiescence Ruling 97-4(9)) regarding the presumption of continuing
07 nondisability in a case where a Plaintiff files a new disability claim after a previous
08 application had been denied. This ruling provides:

09 When adjudicating the subsequent claim involving an unadjudicated
10 period, adjudicators will apply a presumption of continuing
11 nondisability and determine that the claimant is not disabled with
12 respect to that period, unless the claimant rebuts the presumption. A
13 claimant may rebut the presumption by showing a “changed
14 circumstance” affecting the issue of disability with respect to the
15 unadjudicated period, *e.g.*, a change in the claimant’s age category
16 under 20 CFR 404.1563 or 416.963, an increase in the severity of the
17 claimant’s impairment(s), the alleged existence of an impairment(s) not
18 previously considered, or a change in the criteria for determining
19 disability.

20 Acquiescence Ruling (“AR”) 97-4(9).

21 The Commissioner argues that this presumption applies, and that Plaintiff has
22 failed to rebut it. He notes that Plaintiff’s previous and current applications for
23 disability allege the same onset date of April 1999, and that her claim is still largely
24 premised on lower back problems. Although Plaintiff included allegations of
25 limitations based on eczema and incontinence in her current claim, the Commissioner
26 asserts that because the ALJ found that Plaintiff failed to substantiate these
27 impairments, Plaintiff has not shown the changed circumstances sufficient to
28 overcome the presumption. In her reply brief, Plaintiff ignores the Commissioner’s
29 argument, except to the extent that the Court could construe her comment that “the
30 evidence in the record supports the legitimacy of seven years of ‘changing
31 circumstances’ of Ms. James’ limitations” as an effort in this regard.

01 A review of the ALJ's decision reveals that he failed to address the
02 presumption of continuing non-disability or changed circumstances, noting only that
03 the claimant had previously filed an application for disability benefits, had not sought
04 review of that denial, and that there was no basis to reopen her initial claim. Tr. 22.
05 The ALJ's failure to address the presumption of continuing non-disability was error,
06 but because the error was in Plaintiff's favor, it is harmless to the Plaintiff. Whatever
07 the Commissioner argues on this point, he urges the Court to affirm the ALJ's ruling.

08 However, as explained in Section VIII(B) and VIII(D), below, the Court is
09 remanding this case for further proceedings to correct two other errors. Therefore,
10 ALJ is instructed to consider this issue upon remand, and to make specific findings as
11 to whether Plaintiff has overcome the presumption of continuing non-disability.
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14 B. Severity of Impairments

15 The step-two inquiry is a *de minimis* screening device to dispose of groundless
16 claims. *See Bowen v. Yuckert*, 482 U.S. 137, 153-54 (1987). "If a claimant is unable
17 to show that he has a medically severe impairment, he is not eligible for disability
18 benefits." *Id.* at 148. A claimant's impairment, or combination of impairments, is not
19 severe if it does not significantly limit the claimant's physical or mental ability to do
20 basic work activities. 20 C.F.R. §§ 404.1520(c), 404.1521(a). Basic work activities
21 are defined as the abilities and aptitudes necessary to do most jobs, such as (1)
22 walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling; (2)
23 seeing, hearing, and speaking; (3) understanding, carrying out, and remembering
24 simple instructions; (4) use of judgment; (5) responding appropriately to supervision,
25 co-workers and usual work situations; and (6) dealing with changes in a routine work
26 setting. *See* 20 C.F.R. §§ 404.1521, 416.921. "An impairment or combination of

01 impairments can be found ‘not severe’ only if the evidence establishes a slight
02 abnormality that has ‘no more than a minimal effect on an individual’s ability to
03 work.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citations omitted).

04 In the present case, the ALJ found there was enough medical evidence in the
05 record to support Plaintiff’s contention that she suffered from severe back and knee
06 impairments. Tr. 24. However, the ALJ explained that although Plaintiff had been
07 treated for “eczema-like symptoms,” he found “no evidence that this problem had any
08 effect on Plaintiff’s ability to perform work-related activities.” Tr. 24. He therefore
09 declined to find Plaintiff’s eczema to be a severe impairment. Tr. 24. The ALJ did
10 not address the issue of Plaintiff’s incontinence, effectively rejecting her claim that her
11 incontinence was a severe impairment.

12 Plaintiff argues that the record supports a finding that both her eczema and her
13 incontinence created severe work-related impairments, and that the ALJ erred at step
14 two in failing to make this determination. With respect to her allegation of
15 incontinence, she argues that the ALJ’s failure to make any findings is clear error. She
16 also argues that where there is error in the step two analysis, the remainder of the
17 sequential evaluation process is tainted, and either the ALJ’s ruling must be reversed
18 and benefits awarded, or that the action must be remanded for further proceedings.

19 The Commissioner contends that the ALJ’s refusal to find Plaintiff’s
20 incontinence and eczema to be severe is supported by substantial evidence. With
21 respect to Plaintiff’s skin problems, the Commissioner argues that it is debatable
22 whether the Plaintiff successfully established that she suffers from eczema, because
23 this condition was never diagnosed by a dermatologist. Similarly, with respect to
24 Plaintiff’s incontinence, the Commissioner argues that Plaintiff’s medical records
25 contain no diagnosis, and therefore, that any error in this regard was harmless.

26 The Plaintiff presented the following as proof of her impairment due to eczema:

- 01 • An October 15, 2001 assessment by Erin Rogers, a physician's assistant
02 at Valley Medical Center Covington Primary Care, who noted that
Plaintiff had eczema on her hands and behind her ear. (Tr. 225.);
- 03 • A November 20, 2001 evaluation by examining physician Raymond
04 West, M.D., who diagnosed Plaintiff with dermatitis, but noted that it
was "probably eczema." (Tr. 234.);
- 05 • Plaintiff herself testified at the hearing that she had eczema on various
06 parts of her body. (Tr. 301.);
- 07 • Plaintiff wrote in her October 9, 2001 Reconsideration Disability Report
08 that her "chronic eczema is particularly bad on [her] left index finger"
09 and that it "can affect [sic] typing." (Tr. 141.);
- 10 • Her husband, Reginald James, wrote in his Lay Witness Observation
11 Letter that his wife has a "severe case of eczema." He noted that "It can
12 be anywhere on her body. It itches, cracks, bleeds and is sometimes
very painful." (Tr. 168.); and
- 13 • Plaintiff's stepdaughter's Lay Witness Observation Letter stated that
14 Plaintiff "has a very bad rash on her face, neck, and hands. I have seen
15 the rash on her hands crack and bleed." (Tr. 164.)

13 As the Commissioner accurately reports, the evidence does not include a
14 diagnosis of eczema by a dermatologist. Further, neither of the medical reports
15 mentioning Plaintiff's eczema note that she experienced any work-related impairments
16 relating to her skin condition. Tr. 225, 234. Plaintiff's own assertion that eczema on
17 her index finger impacts her ability to type was the only evidence presented of the
18 impact of her eczema on her working life. To satisfy step two's requirement of a
19 severe impairment, a claimant must do more than simply *allege* severity, he or she
20 must prove the physical or mental impairment by providing medical evidence
21 consisting of signs, symptoms, and laboratory findings; a claimant's own statement of
22 symptoms will not suffice. *See* 20 C.F.R. §§ 404.1508, 416.908. Given the lack of
23 medical support for the severity of Plaintiff's impairment due to eczema, it is this
24 Court's opinion that the ALJ's finding that Plaintiff's eczema was not severe was
25 supported by substantial evidence in the record as a whole. *See Penny*, 2 F.3d at 956.

26 However, the ALJ's complete failure to make any findings with respect to

01 Plaintiff's allegations of an impairment based on incontinence is clear error. When an
02 ALJ rejects a claimant's testimony about the severity of symptoms, the ALJ must offer
03 "specific, clear, and convincing reasons for doing so." *Light v. Social Security*
04 *Administration*, 119 F.3d 789, 792 (9th Cir.1997) (citing *Smolen*, 80 F.3d at 1281).
05 Without a proper record from the ALJ, the Court is unable to evaluate the reasons for
06 declining to find Plaintiff's incontinence to be a severe impairment. Plaintiff provided
07 evidence of her incontinence in the form of her own testimony (Tr. 279-81.), notes in
08 various medical records (Tr. 190, 218, 227, 230-31, 234.), a lay witness account (Tr.
09 168.), and paperwork she filled out for Social Security. Tr. 112, 114, 131, 133, 141.
10 While the ALJ might have found Plaintiff's allegations regarding her incontinence to
11 be not credible, or that the medical evidence did not support a finding of severity, he
12 was required to make specific findings which supported his conclusions. *Mersman v.*
13 *Halter*, 161 F. Supp. 2d 1078, 1085 (N.D. Cal. 2001). The Court instructs the ALJ,
14 upon remand, to make specific findings with respect to the severity to Plaintiff's
15 alleged incontinence.

16 On a related note, Plaintiff also attacks the sufficiency of the ALJ's finding of
17 "little objective evidence" (Tr. 24.) for Plaintiff's physical impairments, asserting that
18 the ALJ failed to assess the record as a whole. According to Plaintiff, there is a
19 plethora of evidence in the record supporting her claim of disability. The
20 Commissioner believes that the ALJ did properly consider the medical evidence in this
21 case. However, the ALJ's failure to address the issue of Plaintiff's incontinence,
22 which is an impairment that could have a serious impact on Plaintiff's ability to work,
23 suggests to the Court that upon remand, the ALJ must take greater pains to assess the
24 record as a whole. It is important for the ALJ to consider the combined effect of all
25 the claimant's impairments on her ability to function, without regard to whether each
26 alone is sufficiently severe. *See Smolen v. Chater*, 80 F. 3d at 1290.

01 C. Credibility

02 Plaintiff argues that the ALJ improperly dismissed her testimony on the basis
03 that the allegations of her limitations were at odds with the medical evidence, her
04 contemporaneous statements to treating sources, and medical source opinions. Tr. 25.
05 Plaintiff argues that substantial evidence does not support the ALJ's credibility
06 finding, because the ALJ failed to provide clear and convincing reasons to reject her
07 statements. Plaintiff acknowledges that her symptoms waxed and waned, and that this
08 may have contributed to a lack of clarity in her medical records, but contends that a
09 lack of consistent symptoms should not automatically render her testimony unreliable.
10 The Commissioner maintains that the ALJ properly discredited Plaintiff's testimony
11 alleging greater limitations than those the ALJ assessed in his RFC finding.

12 Absent affirmative evidence of malingering, the ALJ must provide clear and
13 convincing reasons to reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d
14 1044, 1049 (9th Cir. 2001). "General findings are insufficient; rather, the ALJ must
15 identify what testimony is not credible and what evidence undermines the claimant's
16 complaints." *Lester*, 81 F.3d at 834 (citations omitted). "We require the ALJ to build
17 an accurate and logical bridge from the evidence to her conclusions so that we may
18 afford the claimant meaningful review of the SSA's ultimate findings." *Blakes v.*
19 *Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility,
20 the ALJ may consider his reputation for truthfulness, inconsistencies either in his
21 testimony or between his testimony and his conduct, his daily activities, his work
22 record, and testimony from physicians and third parties concerning the nature,
23 severity, and effect of the symptoms of which he complains." *Light v. Social Sec.*
24 *Admin.*, 119 F.3d at 792.

25 In this case, the ALJ found Plaintiff's complaints only partially credible:

26 The claimant testified that she is disabled because of her constant back pain,
she cannot lift objects necessary to complete work duties, she can only walk

01 slowly with a cane, and can only sit for an hour. However, her statements
02 concerning her impairments and their impact on her ability to work are
03 considerably more limited and restricted than is established by the medical
04 evidence, her own contemporaneous statements to treating sources, and medical
05 source opinions. For those reasons, her statements are found to be not entirely
06 reliable. Tr. 25.

07 The ALJ recounted the medical evidence he found to be at odds with Plaintiff's
08 description of her limitations. Tr. 25-26.

09 Dr. Chilczuk noted that claimant, as of two months prior to her January 2002
10 examination, was walking up to three miles three times a week. She reported to
11 Dr. Majid Azzedine, a psychologist who examined the claimant in June 2001,
12 that she liked to have an active life and enjoyed traveling as she was looking
13 forward to a trip at that time. She also testified that she maintains an active
14 online auction business that involves spending time on the computer, packaging
15 items, and bringing the packaged items to the post office to be shipped . . . The
16 claimant reported to Dr. [Raymond] West [on November 20, 2001] that she
17 could walk a mile[.] (Citations omitted.)
18 Tr. 25-26.

19 The Court finds the ALJ's credibility analysis satisfactory. The ALJ rendered a
20 credibility determination with sufficiently specific findings, supported by substantial
21 evidence. *See, e.g., Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (ALJ may use
22 testimony regarding claimant's daily activities to judge credibility). As such, the ALJ
23 need not revisit the issue of Plaintiff's credibility on remand.

24 D. Testimony of Lay Witnesses

25 Plaintiff submitted lay witness statements from the following people: Pearl E.
26 Blazka, Plaintiff's sister; Michelle Johnson, Plaintiff's daughter; Melodie Mellema,
one of Plaintiff's stepdaughter; Kimberly A. Mackey, another stepdaughter; Barbara
Gregory, a neighbor and friend; Robert Palfrey, Plaintiff's son; and Reginald D.
James, the Plaintiff's spouse. Tr. 162-68. Each of these witnesses provides their own
perspective on Plaintiff's physical limitations. The ALJ dismissed all the lay witness
statements with one sentence, opining that "as there is a lack of underlying signs or
findings to support their statements, they will not be given much weight in the final
decision." Tr. 26. The Commissioner argues that the ALJ permissibly concluded,

01 based on the record as a whole, that the statements of the lay witnesses were not
02 supported, and lacked persuasive force, but the Plaintiff argues that the ALJ
03 improperly rejected this testimony. Plaintiff asserts that the ALJ incorrectly rejected
04 the testimony of all these witnesses with one statement, arguing that he had an
05 obligation to make findings germane to the testimony of each witness. The Court
06 agrees. “[L]ay testimony as to a claimant’s symptoms is competent evidence that an
07 ALJ must take into account, unless he or she expressly determines to disregard such
08 testimony and gives reasons germane to each witness for doing so.” *Lewis v. Apfel*,
09 236 F.3d 503, 511 (9th Cir. 2001). The ALJ failed specifically to mention any of the
10 lay witnesses’ statements, let alone provide germane reasons for rejecting them. Upon
11 remand, the ALJ is instructed to make particular findings with respect to each lay
12 witness.

13 E. Use of Vocational Expert

14 At step four of the sequential evaluation process, a vocational expert may be
15 called upon to offer expert opinion testimony in response to a hypothetical question.
16 20 C.F.R. § 404.1560(b)(2). If an ALJ relies upon vocational expert testimony, the
17 hypothetical questions must be based on medical assumptions supported by substantial
18 evidence in the record that reflects the claimant’s limitations. *Osenbrock v. Apfel*, 240
19 F.3d 1157, 1163 (9th Cir. 2000). At the hearing in this case, vocational expert Stephen
20 R. Van Hooten testified that a hypothetical person with the Plaintiff’s age, education,
21 and limitations based upon the Plaintiff’s RFC could work as a mortgage clerk, as that
22 job is generally performed in the national economy. Tr. 320-324.

23 Plaintiff argues that the ALJ made several errors in his reliance on the
24 testimony of the vocational expert. First, Plaintiff argues that when a person between
25 60 and 64 years of age has a severe impairment, Social Security will not consider the
26 person able to adjust to sedentary or light work unless the person has skills that are

01 highly marketable. Here, Plaintiff contends that the ALJ erred in failing to make
02 findings to determine if the skills acquired by Plaintiff in her job as a document
03 control specialist were highly marketable as required by 20 C.F.R. § 404.1563(d).
04 The Commissioner effectively rebuts Plaintiff's argument that the ALJ improperly
05 failed to take her age into account. The Commissioner explains that an ALJ does not
06 consider age of the claimant until step five of the sequential evaluation process, a step
07 not reached in this case, and that in any event, this consideration was removed from
08 the regulations as of May 8, 2000. Moreover, The Commissioner has properly stated
09 the current law on this topic. *See* 65 FR 18000.

10 Second, Plaintiff argues that the ALJ failed to provide the proper limitations in
11 his hypotheticals to the vocational expert, by neglecting to mention that Plaintiff could
12 only occasionally reach overhead. The Commissioner maintains that the ALJ's
13 hypothetical, and the RFC upon which it was based, properly summarized Plaintiff's
14 functional limitations. The Court agrees with the Commissioner on this point. It is
15 true that a hypothetical posed to a vocational expert must include all of the claimant's
16 functional limitations supported by the record. *Thomas*, 278 F.3d at 956 (*citing Flores*
17 *v. Shalala*, 49 F.3d 562, 520-71 (9th Cir. 1995)). But in this case the ALJ was not
18 required to include in his hypotheticals Plaintiff's limitation on reaching overhead,
19 because the Dictionary of Occupational Titles (DOT) description of the position of a
20 mortgage clerk states that such an employee would have to reach overhead only
21 occasionally.

22 Third, Plaintiff asserts that the ALJ improperly failed to incorporate the
23 testimony of Plaintiff and the lay witnesses into his hypothetical questions to the
24 vocational expert. The Commissioner contends that the ALJ was not compelled to
25 include any testimony he deemed unreliable in his hypotheticals. The Commissioner
26 is correct on this point. When framing hypothetical questions, the ALJ is required to

01 include only those allegations he finds credible. *Magallanes*, 881 F. 2d at 756-57.
02 Therefore, the Court finds no error in the ALJ's reliance on the testimony of the
03 vocation expert. However, upon reevaluating the evidence regarding plaintiff's
04 incontinence, the ALJ may find it necessary to re-frame his hypothetical questions to
05 Mr. Van Hooten.

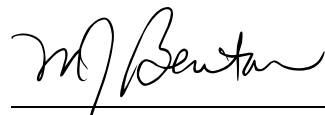
06 IX. CONCLUSION

07 For the reasons described above, this matter is hereby REVERSED and
08 REMANDED for further proceedings. Upon remand, the ALJ is instructed to:

- 09 (1) Make specific findings as to whether Plaintiff has overcome the
10 presumption of continuing non-disability;
11 (2) Make specific findings with respect to the severity to Plaintiff's alleged
12 impairment due to incontinence; and
13 (3) Make particular findings with respect to each lay witness.

14 Depending upon the results of his reevaluation of the evidence in this case, the
15 ALJ may need to re-frame his hypothetical questions to the vocational expert.

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17 DATED this 6th day of January, 2006.

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21 MONICA J. BENTON
22 United States Magistrate Judge
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